SERVED: January 11, 2000

NTSB Order No. EM-186

UNITED STATES OF AMERICA
**NATIONAL TRANSPORTATION SAFETY BOARD**
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of December, 1999

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| JAMES M. LOY,<br>Commandant,<br>United States Coast Guard, | ) | |
| v. | ) | Docket ME-164 |
| WILLIAM E. WRIGHT,<br>Appellant. | ) | |

**OPINION AND ORDER**

Appellant, by counsel, seeks review of a decision of the Commandant (Appeal No. 2583, dated July 7, 1997) affirming a decision entered by Coast Guard Administrative Law Judge Peter A. Fitzpatrick on March 9, 1995, following an evidentiary hearing that concluded on January 10, 1995.[1] The law judge sustained a

[1]Copies of the decisions of the Commandant and the law judge are attached.

charge alleging that appellant was a user of a dangerous drug (to wit, marijuana) and, by order served on April 10, 1995,[2] revoked the appellant's Merchant Mariner's License (No. 648313) and his Merchant Mariner's Document (No. 146-18-8196). As we find no valid basis in appellant's assignments of error for overturning the Commandant's affirmance of the law judge's decision and order, appellant's appeal, to which the Coast Guard filed a reply in opposition, will be denied.[3]

The relevant facts for the purposes of our review of this appeal are essentially undisputed: the appellant tested positive for marijuana when he sought to obtain a drug free certificate necessary for him to exercise the seagoing rights and privileges of his license and document. He did not attempt to establish at his hearing before the administrative law judge that the test result was invalid for any reason relating to the collection or processing of the urine sample from which it was derived, and he did not establish, consistent with his denial of having ever used marijuana, that there was any other reasonable medical explanation for the presence of the illicit substance in his system. Appellant's evidence in defense of the Coast Guard's charge consisted of his testimony denying any drug use and the supporting testimony of his wife and his doctor (by telephone), who both denied knowledge of any drug involvement by appellant in

[2]A copy of this order is also attached.

[3]Because we find that the written submissions and the record provide an adequate basis for our review of the issues raised, appellant's request for oral argument is denied.

their many years of association with him.

We find it unnecessary to address in detail most of the arguments renewed here that either the law judge or the Commandant has previously rejected, for we are not persuaded that they have incorrectly analyzed any of the issues appellant raised for their consideration. We will, accordingly, direct our comments primarily to those matters raised on appeal that underlay appellant's insistence that, notwithstanding the Commandant's asserted reasons for upholding the revocation, he has not been dealt with in accordance with legal requirements.

Appellant in effect argues that the Coast Guard's decision to take action against his merchant mariner authorizations was arbitrary and capricious because, among other referenced circumstances that do not support the accusation that he has not been treated fairly, the investigating officer had "absolute discretion" as to whether to prefer the drug use charge, the law judge had no discretion not to revoke his license and document, and the positive drug test created a conclusive presumption that appellant had a physical or physiological dependence that needed to be cured. These arguments are without merit.

While we do not believe the Board may appropriately examine, at least directly, the prosecutorial judgments made by investigating officers or the scope of discretion the Commandant affords them, if we could review such judgments, we would have no difficulty concluding that this case presented no basis for questioning the investigating officer's decision to initiate a

proceeding. Appellant's contrary view appears to rest, essentially, on the proposition that the investigating officer, despite an unimpeached positive drug test, was not free to discount or disregard, *inter alia*, the appellant's denial of drug use or his wife's and his doctor's disavowal of knowledge of any drug use by him.[4] We see no error or abuse of discretion in the investigating officer's decision to leave the resolution of such conflicting evidence to a law judge.[5] More to the point, to the

[4]Appellant takes issue with the Commandant's summary of the law judge's decision as including a negative credibility assessment as to the testimony appellant sponsored. While the law judge may not have made explicit credibility findings, his conclusion that appellant's evidence was insufficient to overcome the presumption of drug use that the positive test result raised reflected, at the very least, a determination not to credit appellant's denial of having ingested marijuana. In any event, we think the Commandant accurately described the law judge's findings in this regard (Decision at 5):

> The Administrative Law Judge did not find the testimony presented by the Appellant sufficient to overcome the presumption established by the Investigating Officer. [D&O at 10-11]. He viewed the disclaimers of drug use by both the Appellant and his wife as self-serving and decided that the statements should be viewed circumspectly. The Administrative Law Judge also indicated that Dr. DeLara had little knowledge of the Appellant's daily activities. [Order of Revocation at 2]. A decision by the Administrative Law Judge as to credibility and weight to be given evidence will be upheld on appeal unless the decision is clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence.

[5]We also see no error or abuse of discretion in the Commandant's refusal to allow the appellant, after the hearing had ended, to attack the investigating officer's decision to prefer a charge on the ground that it was based on improper considerations, such as appellant's "race, his modest license, and his lack of formal maritime training" (Appeal Brief, Supplemental Argument at 23). If the appellant had any evidentiary basis for such an accusation, it should have been adduced at a juncture that would have allowed the investigating officer a proper opportunity to respond to it; namely, on the

extent a Coast Guard prosecutor would ever be answerable for bringing a case that, unlike this one, did not succeed in the crucible of adjudication, we think it doubtful that the reason would be his rejection of a suspect's disclaimer of wrongdoing or of an interested witness's professed lack of knowledge of wrongdoing by a suspect.[6]

Appellant's challenge to the law judge's determination that revocation was the only sanction that could be imposed is also unavailing, for the law judge had no discretion not to order revocation given appellant's failure to provide evidence that he was "cured" of drug use.[7] The arguments appellant presents as to

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stand, under oath, before the law judge. Nevertheless, even if appellant should have been permitted to advance such an allegation post-hearing, and the Commandant was mistaken in asserting that appellant's objection had been waived, no prejudice resulted, since the Commandant in fact considered the claim and rejected it for want of any proof to support it: "Although waived, I will state there is absolutely no evidence to indicate any improper motives on the part of the Investigating Officer" (Commandant's Decision at 8).

[6]The testimony of appellant's doctor, who saw him every month and a half or so, was of marginal relevance. While he stated that he had not "seen any evidence in [appellant's] behavior that . . . he is using any mind altering drug," he did not suggest that any drug use by appellant would be evident to him by virtue of any care he was providing. Moreover, he acknowledged that "I don't think any doctor can be sure what somebody does after he goes home." Transcript of Hearing at pp. 383-84.

[7]The statute under which appellant was charged, Section 7704(c), 46 USC, provides as follows:

> §7704. **Dangerous drugs as grounds for revocation**
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> * * * *
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> (c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked

why he should not have been required to demonstrate that he is cured of a drug problem flow from his position that the positive drug test should not have outweighed his denial of marijuana use and his views as to why he believes the investigating officer, notwithstanding the test result, should not have pursued the matter. Since, however, the appellant's evidence was not found to be sufficient to overcome the presumption of drug use, and nothing in his appeal persuades us that that finding should be disturbed,[8] he cannot be heard to argue here that he cannot lawfully be required to establish that he is cured of marijuana dependency.[9] Given the showing of drug use, it was the statute, not the Coast Guard, that obligated appellant to "provide[] satisfactory proof that [he] is cured."[10]

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unless the holder provides satisfactory proof that the holder is cured.

[8]The fact that the law judge did not believe the appellant's denial of having used marijuana does not establish that the Coast Guard improperly treated his positive drug test as raising an irrebuttable or conclusive presumption of drug use. It does not appear that a law judge could not accept a mariner's denial as enough to defeat a presumption raised by a drug test, although, as was true in this case, a law judge, while keeping an open mind as to what all of the evidence might ultimately show, may well be skeptical that a denial would overcome or constitute adequate explanation for solid medical evidence of drug ingestion.

[9]In this connection, we think the Coast Guard, having reasonably concluded that appellant's evidence (namely, his denial of drug use and the supporting testimony of his wife and doctor) did not overcome the presumption that he had used marijuana, could just as reasonably reject that same evidence as insufficient to show that appellant was "cured" of drug use.

[10]The provision of the Administrative Procedures Act (namely, 5 U.S.C. Section 558 (c)) that contemplates giving a license holder, among other things, an "opportunity to demonstrate or achieve compliance with all lawful requirements"

Although appellant argues that the standard the Coast Guard applies for determining proof of "cure" should be invalidated because, among other reasons, it was developed through adjudication rather than through rulemaking, he has not demonstrated that the standard is either unreasonable or irrational.[11] Rather, he maintains, in effect, that the standard is deficient because it precludes consideration or acceptance of the evidence he advanced on the issue of cure. Appellant's position is without merit.

In Appeal Decision 2535 (Sweeney), the Commandant held that a mariner could establish proof of cure by showing that he had successfully completed a drug abuse rehabilitation program and that he had not had any association with drugs for at least one year. Contrary to appellant's assertion here that his evidence on cure was not considered, the Commandant in his decision in this case stated as follows:

> Appellant did not offer any evidence to prove enrollment in any, let alone a bona fide, rehabilitation program nor demonstrate a complete non-association with drugs for any period of time. Appellant's only offer of evidence was the testimony of himself, his doctor [*sic*, wife], and his physician regarding Appellant's use, or non-

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before taking action against his license, did not, as appellant illogically suggests, obligate the Coast Guard to allow appellant to show that he was cured of drug use before revoking his license and document. Aside from the fact that Section 7704 (c) would not authorize revocation of cured drug users, the referenced APA provision, by its express terms, does not apply to license actions required in the interest of public safety.

[11]In Commandant v. Sweeney, NTSB Order No. EM-165 (1992) at note 10, we expressed our belief, in another case involving the question of "cure" under 46 U.S.C 7704 (c), that "rulemaking through adjudication is an acceptable method of interpreting legislation."

> use, of drugs. Arguably, this evidence goes to the issue of complete non-association with drugs. However, the evidence needed to satisfy proof of cure through complete non-association with drugs requires a higher level of monitoring then [*sic*] mere testimony. Additionally, in finding the Appellant a user of drugs, the Administrative Law Judge had already determined that this testimony was not sufficient to overcome the presumption created by the positive test, and thus was not sufficient to prove cure. Thus, the Appellant failed to meet his burden of showing evidence of cure. By statute, the Administrative Law Judge had no choice but to revoke Appellant's documents. *See* 46 U.S.C. 7704(c).

There is, in short, no merit to the claim that the so-called Sweeney standard foreclosed consideration by the Commandant of appellant's evidence on cure.[12] Rather, it was considered and, correctly, we believe, rejected as not constituting satisfactory proof.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The appellant's appeal is denied; and

2. The Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[12]In its brief, the Coast Guard cites several decisions by the Commandant for the proposition that the Sweeney criteria for establishing cure are not inflexible requirements, but, rather, are guidelines subject to evaluation in the context of determining the adequacy of proof of cure in a given case.